

South Carolina Department of Insurance

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To: All Members of the Insurance Industry

From: Ernst N. Csiszar
Director 

Re: The Use of Electronic Commerce (Signature and Records) in Connection with the Business of Insurance and Other Related Products or Engaging in Other Business Regulated by the South Carolina Department of Insurance

Date: April 24, 2003

I. Purpose

Advances in technology are allowing businesses to integrate various elements of electronic commerce into their operations. The Internet and electronic commerce have resulted in increased opportunities and efficiencies for both industry and consumers. It has been the position of this Department that insurers and other licensees may transact the business of insurance electronically, provided they comply with the applicable law governing this medium. The purpose of this Bulletin is to provide information to consumers and members of the industry about the electronic transaction of the business of insurance.

II. Overview of the Law on Electronic Commerce

It has been the position of the South Carolina Department of Insurance that the business of insurance may be transacted electronically. This position is supported by both state and federal law. What follows is a summary of some of the pertinent state and federal statutes affecting the transaction of the business of insurance electronically.

The Electronic Signatures in Global and National Commerce Act (E-Sign Act), 15 U.S.C.A. § 7001, became effective on October 1, 2000. The E-Sign Act was intended to spur the growth of electronic commerce. It applies to foreign and interstate commerce by ensuring that electronic contracts, signatures and records have the same legal status as ink and paper counterparts. The E-Sign Act expressly applies to the business of insurance. Specifically, the E-Sign Act provides that signatures, documents or other records related to a transaction cannot be denied legal effect solely because they are in an electronic format. Especially important for the insurance industry is the E-Sign Act's recognition

that consumer disclosures required to be provided by insurers or insurance producers may be provided exclusively through electronic means, if certain procedural safeguards are followed.

The recently enacted federal "*Electronic Signatures in Global and National Commerce Act*," 15 U.S.C. §§ 7001-7031 (2000), may preempt, in whole or in part, the South Carolina Digital Signatures Law. Generally speaking, insurance transactions may be effectuated electronically over the Internet to the same extent that they may be effectuated by other means. That is, effectuating an insurance transaction over the Internet does not add any additional requirements not otherwise required under the South Carolina insurance laws. However, requirements may not be disregarded, such as document formatting and signature requirements, because the transaction is being effectuated over the Internet. Thus, if a statute or regulation requires a signature to effectuate a certain type of insurance policy, then a signature must be obtained.

Many other states have adopted a model state-based electronic signatures and records law called the Uniform Electronic Transactions Act (UETA). The E-Sign Act provides that UETA will govern the validity of electronic signatures and electronic contracts or other records if a state has adopted UETA. UETA's ultimate objective is to make electronic contracts as enforceable as contracts memorialized on paper; it does not set forth new standards for the formation or performance of contracts. UETA does not mandate electronic contracts, UETA § 5(a), but leaves it to the option of the parties involved whether or not to contract electronically or by traditional means. UETA expressly provides that it "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means." UETA § 5(b). The Act also makes it clear that "[a] party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means." *Id.* at § 5(c). Decisions to contract by electronic means may be made on a case-by-case basis.

III. Regulatory Requirements

South Carolina has not enacted UETA. The South Carolina Electronic Commerce Act (SCECA), SC Code Ann. § 26-5-10 *et seq.*, establishes a legal framework in South Carolina for the conduct of electronic commerce. The SCECA specifies five electronic signature criteria that, if met, give the same validity and effect to an electronic signature that is given to a signature affixed by hand. Because the SCECA is not UETA, the E-Sign Act may preempt the SCECA or certain portions thereof. Because of the broad preemption provisions of the E-Sign Act, there is uncertainty as to whether insurers, agents and other licensees of the Department must comply with some or all of the requirements of the SCECA.

Accordingly, insurance forms may be electronically created and signed and transmitted or delivered, ***provided*** the electronic methodology implemented meets the criteria imposed by applicable law. All other applicable statutory and regulatory requirements must also be met. The electronic version of an existing insurance application or form must be submitted to the Department for approval (if subject to prior

approval) if the electronic version differs from an already-approved form in text or other material manner. Where there are no textual differences in the forms, no separate approval is required for the electronic form.

The South Carolina Department of Insurance encourages members of the insurance industry carefully to review the SCECA as well as other applicable federal laws in connection with the use of electronic signatures and records in their operations. Insurers, agents and third party administrators, *et al.*, incorporating the use of electronic commerce into their operations should review the legal and technical ramifications of such a decision as well as their current forms and procedures to determine whether they need to be revised to accommodate electronic commerce. In addition, record retention procedures should be reviewed to ensure proper maintenance, integrity, security and privacy of electronic documents.

Insurance transactions subject to the SCECA or the E-Sign Act may also be subject to other applicable law. Regulated persons and entities should refer to other applicable law when seeking to integrate elements of electronic commerce into their insurance or other business operations. For example, the following should be considered:

- Electronic transactions must comply with the privacy requirements of the federal Gramm-Leach-Bliley Act; the federal Health Insurance Portability and Accessibility Act (HIPAA), and related state statutes and regulations;
- Any person or entity that wishes to transact the business of insurance in South Carolina must be properly licensed, registered or otherwise authorized to conduct the business of insurance within this state;
- Laws requiring that information be produced or made available to the Department also apply to information created or maintained in an electronic format;
- Contracts, policies and other products marketed to South Carolina residents by electronic commerce must meet applicable legal requirements, including the following:
 - requirements regarding the free look period specified in South Carolina law;
 - formatting requirements including pagination and type size, as well as requirements that certain language be conspicuous or be placed in a certain location within a document;
 - requirements regarding prior approval; file and use subject to review and/or approval; file for information; and/or exemption from review.

Although transactions may be conducted electronically, neither South Carolina nor federal law mandates that it be. The use of electronic signatures and records is voluntary. Accordingly, a person who has consented to conduct one transaction electronically may refuse to conduct subsequent transactions electronically. Likewise, neither state nor federal law limits the ability to assert that an electronic signature is (i) a forgery; (ii) used without permission; or (iii) invalid (other than solely on the grounds that it is electronic in nature). Concomitantly, these laws also do not affect the timing or content of any disclosure required to be provided to the consumer under any relevant law

or regulation. However, under the E-Sign Act notices of the termination or lapse of life insurance policies (but not annuities) and health insurance policies may not be provided through an electronic record. Requirements that a document be notarized or made under oath may be accomplished electronically, provided all other legal requirements of the relevant statute are satisfied.

Electronic records that take the place of paper records that are required to be provided to a consumer in writing (e.g., delivery of an insurance policy) must be capable of review, retention and printing by the consumer as long as the consumer is using the types of computer hardware and software specified by the Provider. Federal law also provides that the consumer must affirmatively consent to the use of electronic signatures and records and the consumer must not have withdrawn his or her consent to the use of electronic signatures and records prior to such use. To satisfy the consent requirement, the consumer must consent electronically, or confirm consent electronically, in a manner that reasonably demonstrates that he or she can access the record in the electronic format used by the Company.

IV. Questions

Please direct questions regarding the content of this Bulletin to the attention of:

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